Perwira Affin Bank Bhd v Saad bin Abdullah & Anor

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–16 OF 1995
FAIZA TAMBY CHIK J
5 APRIL 1999

Land Law *— Charge — Notice of demand — Failure to comply with terms of charge annexure — Sum claimed and specified in demand was not sums secured under the charges — Whether demand valid*

The defendants were the registered proprietors of a piece of land. The defendants executed a first legal charge in favour of the plaintiff to secure banking facilities to Saad Sdn Bhd ('the borrower') up to the sum of RM80,000 together with interest thereon. By way of a second charge, the defendants executed a second legal charge to secure banking facilities to the borrower up to the sum of RM50,000 together with interest thereon. The borrower defaulted on the repayment of the banking facilities. Subsequently the plaintiff sent to the defendants a notice in Form 16D under s 254 of the National Land Code 1965 ('the Code'). There was no response from the defendants in relation to the Form 16D. The plaintiff made an application for an order of sale of the land. The defendants submitted that the Form 16D was invalid because the sum claimed and specified in it was not the sums secured under the charges. The alleged claim of principal and interest clearly exceeded the sums secured under the terms of the charge annexure. There was no evidence of notice of variation of interest being served on the defendants.

Held, dismissing the application:

Failure to comply with the terms of the charge annexure went to the root affecting the validity of the demand. The burden was on the plaintiff to show that Form 16D was issued in accordance with the charge. The plaintiff had failed to do so and thus the plaintiff's application was dismissed (see pp 428I, 432A).

[Bahasa Malaysia summary

Defendan-defendan adalah tuan punya tanah berdaftar sebidang tanah. Defendan telah melaksanakan suatu gadaian pertama yang berpihak kepada plaintif untuk memperolehi kemudahan perbankan kepada Saad Sdn Bhd ('peminjam tersebut') sehingga ke jumlah RM80,000 bersama-sama dengan faedah. Dengan gadaian yang kedua, defendan-defendan telah melaksanakan gadaian kedua untuk memperolehi kemudahan perbankan kepada peminjam sehingga jumlah RM50,000 bersama-sama dengan faedah. Peminjam telah ingkar dalam pembayaran balik kemudahan perbankan tersebut.

Kemudian plaintif telah menghantar kepada defendan suatu notis dalam Borang 16D di bawah s 254 Kanun Tanah Negara 1965 ('Kanun tersebut'). Tiada terdapat balasan daripada defendan-defendan berkenaan dengan Borang 16D tersebut. Plaintif telah membuat permohonan untuk perintah penjualan tanah tersebut. Defendan-defendan telah berhujah bahawa Borang 16D adalah tidak sah kerana jumlah yang dituntut dan juga dinyatakan di dalamnya bukanlah jumlah yang diperolehi di bawah gadaian. Dakwaan tuntutan terhadap wang pokok dan faedah dengan jelas melebihi jumlah yang diperoleh di bawah terma-terma kepada lampiran gadaian. Tiada terdapat keterangan notis tentang perbezaan faedah yang dikenakan ke atas defendan-defendan.

Diputuskan, menolak permohonan tersebut:

Kegagalan untuk mengikut terma-terma kepada lampiran gadaian tersebut telah menjurus ke punca yang menjejaskan kesahan tuntutan tersebut. Beban adalah pada plaintif untuk menunjukkan bahawa Borang 16H telah dikeluarkan adalah menurut gadaian tersebut. Plaintif telah gagal untuk berbuat sedemikian dan oleh itu permohonan plaintif telah ditolak (lihat ms 428I, 432A).]

Notes

For cases on notice of demand, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1645–1659.

Cases referred to

Bunbury Foods Pty Ltd v National Bank of Alasia Ltd (1984) 153 CLR 491 (refd)

Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404 (refd)

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405 (refd)

Malaysian International Merchant Bankers Bhd v Chi Liung Holdings Sdn Bhd [1992] 1 MLJ 735 (refd)

Mediservices Pty Ltd v Stocks & Realty Pty Ltd [1982] 1 NSWLR 5 (refd)

Nira Sdn Bhd v Malayan Banking Bhd [1990] 1 MLJ 110 (refd)

Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd [1984] 1 MLJ 115 (refd)

Legislation referred to

National Land Code 1965 ss 253(1), 254(1), 256

Rules of the High Court 1980 O 83

Ben CC Chan (*Skrine & Co*) for the appellant. A
CT Lee (*CT Lee*) for the respondent.

Faiza Thamby Chik J: This is an application by the plaintiff by way of an originating summons for, inter alia, an order for sale of the land held under Q T (R) 4561, L O 7173, Mukim Setapak, Negeri Selangor ('the said land') under s 256 of the National Land Code 1965 ('the Code'). The application B is supported by the affidavit of the plaintiff's branch manager, Wan Anuar bin Abu Kasim affirmed on 31 December 1994.

The material facts are undisputed by the parties and may be stated as follows:

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(1) The defendants were at all material times and still are the registered proprietors of the said land.

(2) Pursuant to a charge dated 16 April 1982, viz charge presentation No 7989/82 Vol 16, Folio ('the first charge'), the defendants executed a first legal charge in favour of the plaintiff over the said Land to secure D the repayment of all moneys given by way of banking facilities to a company called Saad Sdn Bhd ('the borrower') up to the sum of RM80,000 together with interest thereon.

(3) By way of a second charge dated 16 April 1982, viz charge presentation No 7990/82, Vol 26, Folio 6 ('the second charge'), the E defendants executed a second legal charge in favour of the plaintiff over the said land to secure repayment of all moneys given by way of banking facilities to the borrower up to the sum of RM50,000 together with interest thereon.

(4) The first defendant was at all material times the director in the F borrower company.

(5) The first defendant was adjudicated as a bankrupt on 22 May 1997, viz Kuala Lumpur High Court, Bankruptcy No D2–43–29–2878–94.

(6) The borrower company was wound up by the High Court.

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(7) The borrower defaulted on the repayment of the banking facility, and as at 31 July 1994 the amount owing by the borrower to the plaintiff was RM540,593.63.

(8) By letter dated 13 September 1994, the plaintiff through its solicitors demanded the defendants payment of the sum of RM540,593.63 H being the amount owing on the borrower's accounts with the plaintiff as at 31 July 1994 together with interest thereon to be made within 7 days from the date of the demand (see exh A-4 in encl 1).

(9) The defendants have failed to comply with the said demand and thereby defaulted.

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(10) On 5 December 1994, the plaintiff through its solicitors sent by hand to the defendants a notice in Form 16D under s 254 of the Code

A calling on the defendants to remedy the breach within 14 days from the service of the said Form 16D (see exh A5 in encl 1).

(11) There was no response from the defendants in relation to the Form 16D.

B The parties have agreed to confine their argument relating to the validity of the Form 16D issued by the plaintiff. The first defendant in his affidavit affirmed on 15 November 1995, at paras 5 and 6 alleges that:

(5) Jumlah wang merujuk perenggan 7 hingga 10 yang dihutangi seperti dinyatakan dalam surat tuntutan tersebut dikirakan melalui perenggan 12 dan tidak sesuai dengan gadaian annexure tersebut.

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(6) Dalam alternatifnya notis tersebut tidak sah.

The defendants submitted that before the plaintiff can exercise the power of sale three requirements must be present, ie: (1) breach of covenant under the charge in question; (2) notice before application for an order for sale; D and (3) breach continued for one month.

Section 254(1) of the National Land Code 1965 states:

(1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified E in the charge, the chargee may serve on the chargor a notice in Form 16D —

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in F the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

Section 253(1) of the National Land Code says:

G The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

Section 253(1) is to enable the chargee to obtain the sale to which his charge H relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein. It appears that there must be a breach of the agreement expressed or implied. Section 254(1)(a) seems to say that the breach in question must be specified in the Form 16D.

The defendant's affidavit-in-reply affirmed on 15 August 1996 (encl 11) para 5 said: 'Jumlah wang merujuk perenggan 7 hingga 10 yang I dihutangi seperti dnyatakan dalam surat tuntutan tersebut dikirakan melalui perenggan 12 tidak sesuai dengan gadaian annexure tersebut' and para 6 said: 'Dalam alternatifnya notis tersebut tidak sah'. What the

defendants said was that the sum claimed and specified in Form 16D was not the sums secured under the charges. The evidence of the defective Form 16D was self-evident in the plaintiff's letter of demand, Form 16D and the plaintiff's affidavit in support of the application (encl 2). The plaintiff's letter of demand (encl 2 'exh A-4' at pp 38–39) stated the sum to be paid as RM50,593.63 as at 31 July 1994 with interest at daily rest at the rate of 2.5% above the plaintiff's BLR (presently 7.05 per annum). The alleged claim of principal and interest clearly exceeded the sums secured under the terms of the charge annexure as agreed under cl 1 of the charge, ie encl 2 first charge at exh A-2 (p 12) at p 16 secured for up to the sum of RM80,000 and the second charge at exh A-3 (p 25) at p 29 secured up to the sum of RM50,000 with interest thereon at 7.5% per annum at monthly rest. Cl 1 of the charge annexure was self-evident. The total sum secured by these two charges added up to RM130,000 only. Further, cl 3 of the charge annexure of both charges said:

> Notwithstanding the provisions relating to the rate of interest as hereinbefore provided the bank shall be entitled at any time and from time to time to vary at its discretion such rate of interest by serving a notice in writing on the customer(s) and the chargor(s) of such intention and such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

There was no evidence of such notice with regard to the variation of interest to the customer (borrower) and the chargor. The plaintiff's letter of demand (exh A-4) at p 38 of encl 2 stated the overdraft facility as RM350,000 and alleged interest at 2.5% per annum above the plaintiff's then BLR of 7.05% per annum on daily rest, ie principal and interest well above what has been agreed in cl 1 of the charge annexure. This clearly showed that the alleged breach of failure to pay the sum of RM540,593.63 with the alleged interest was not a breach, ie the plaintiff was claiming a sum and interest which were not lawfully due under the charge. Para 4(a) and (b) of encl 2, pp 2–3 confirmed the amount secured under the charge as RM80,000 and RM50,000. The defendants in para 5 of their affidavit-in-reply affirmed on 15 August 1996 (encl 11) denied the plaintiff's claim and said that the alleged sum claimed was not in accordance with the charge annexure. Further, in para 10 of the said affidavit, the defendants said that there were three charges by the defendants and other parties for only one overdraft. The three properties were exhibited at 'exh SA-4' at p 29 of Saad's affidavit-in-reply at encl 11. The other actions can be seen at 'exh SA-2' (pp 9–18), 'exh SA-3' (pp 19–28) for the same alleged advance of RM350,000 (please see pp 17 and 27 of Saad's affidavit at encl 11). These were not denied by the plaintiff. This clearly showed that the advance secured and due under the two charges in the present action could not be RM350,000.

It is submitted that the whole claim in the plaintiff's letter of demand at exh A-4 at p 38 of the plaintiff's supporting affidavit of Wan Anuar bin Abu Bakar affirmed on 31 December 1994 at encl 2 was wrong. The burden of

proof was on the plaintiff to show that they had specified the breach of the agreement, ie claimed the principal sum and interest lawfully due under the agreement as per the terms of the charge annexures in the Form 16D. This they had not done so. Therefore, the alleged breach was not a breach. The defendant's contention was that there was no breach under the terms of the charge annexure and the alleged breach of the agreement was not specified. It was submitted that Form 16D was therefore invalid.

In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283, it was held that 'The sum demanded by the plaintiff in their notices of demand had included the element of default interest. ...' The wrongful demand for payment of the default interest to which the plaintiff were not entitled must necessarily render the notice of demand and the notice in Form 16D ineffectual and invalid.

In *Mediservices Pty Ltd v Stocks & Realty Pty Ltd* [1982] 1 NSWLR 516 it was held that:

> The notice which must be given to a mortgagee as a condition precedent to the exercise of a power of sale pursuant to the Real Property Act, 1900 s 57, should identify the covenant, agreement or condition in respect of the observance of which the mortgagor is alleged to have made default of the principal, interest, rent-charge or other money in respect of the payment of which the mortgagor is alleged to have made default.

At p 522, Wootten J said:

> It seems natural and legitimate to put some emphasis on the word 'the' in certain parts of the section. The notice must require the mortgagor to observe 'the' covenant or covenants, agreement or agreements, or condition or conditions, in respect of the observance of which he has made default, or to pay the principal, interest or the other money in respect of the payment of which he has made default. Section 57(4) proceeds on the basis that it is possible to identify 'the default to which the notice relates'. Section 57(5) also proceeds on the assumption that it will be possible to identify a particular default and the time when the powers conferred by s 58 become exercisable by reason of that default ...
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> It is not an adequate answer to these considerations to say that a notice may still be good even though it erroneously claims more than the amount due, or erroneously includes some default which has not in fact taken place. ...

The above-mentioned case suggests that the notice must identify the agreement which the mortgagor was said to have made default.

Section 254(1)(a) of the Code requires Form 16D specifying the breach in question. The word 'specify' in the *Little Oxford Dictionary* means 'name expressly, mention definitely'. It can be clearly seen in Form 16D that no breach is specified (see encl 2 p 43). The defendants submitted that 'failing to pay in full the sum stated in Messrs Skrine & Co's letter dated 13 September 1994' was not the breach under cl 1 of the two charges. Form 16D referred to the letter of demand and not to the agreement under the charge annexure. Even assuming that the plaintiff can refer to the letter of

demand of their solicitors, Skrine & Co dated 13 September 1994 to see what was the amount claimed, the sum of RM540,593.63 and interest of 2.5% per annum above plaintiff's BLR on daily rest was not the sum secured or lawfully due under cl 1 of the two charges. The plaintiff subsequently in their affidavit of Awang bin Dollah affirmed on 27 November 1995 at para 9 therein admitted that the sums secured under the charges were RM80,000 and RM50,000 respectively and the purported total sum due under the two charges was RM146,196.40 as at 4 December 1995. The difference between the sum purportedly claimed in the letter of demand and the sum now purportedly secured and due under the charges was very substantial. The defendant have been asked to pay RM540,593.63 plus interest not according to the charge instrument. The defendants submitted that the purported Form 16D was therefore invalid. The defendants in para 6 of their affidavit-in-reply (encl 11) said the notice was invalid.

In support of their argument counsel for the defendants referred to the above-mentioned *Cooperative Central Bank* case where the wrongful demand for payment which the plaintiff were not entitled must necessarily render the notice of demand and the notice in Form 16D ineffectual and invalid. *Co-operative Central Bank* is cited with approval by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 at p 83 G.

In *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at p 413 paras 30–40 and p 414 para 5 the court explained as to what is the effect of an error in specifying the appropriate sum in a notice before sale:

> The statement must be read against the background that the total amount of principal and interest said to be due, and demanded by the notice, was in fact specified (namely at the sum of RM459,990.92). That told the mortgagor what he was required to do, and no substantial error in the accuracy of that total was suggested. If it were suggested that the amount to paid, or the amount of the default (usually the same amount) did not need to be specified at all, I could not agree, because the statute seems to require an amount to be specified.
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> Accordingly, the position may be summarised as follows. Where a default in the payment of principal and interest (or both) is relied on, s 84(1) requires an amount to be specified. An error in specification of the appropriate sum will not be the end of the matter. A question of fact and degree is involved in every case. The most relevant factors determining validity will be the extent of the error, and the capacity of the notice to give the mortgagor a reasonable opportunity to do what he is obliged to do. ...
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> In the present case, there is uncertainty as to whether there has been an acceleration; there is an error with an enormous scope, the mortgagor was not given any clear lead on the nature of the obligation which the mortgagee was asserting, or any clear apprehension of what it would achieve by paying a sum that bore no direct relationship to the sum it owed the mortgagee. I am satisfied that the notice was invalid.

In *Low Lee Lian* case it was held by the Federal Court that:

> (1) 'Cause to the contrary' within s 256(3) of the Code might be established only in three categories of cases:
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> (i) ...;
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> (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and ...

At p 83, the Federal Court said:

> Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283.

At p 88, the Federal Court further said:

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.
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> In this last respect, if he is satisfied, on a careful and an objective assessment of the factual material made available to him, that the chargor has shown cause to the contrary in the sense we have discussed earlier in this judgment, he will refuse an order for sale. On the other hand, if he finds as a matter of law that the allegations raised by the chargor do not constitute cause to the contrary he will merely say so, giving his reasons, and grant the chargee's application.

The validity of Form 16D will depend on the evidence adduced not only from the defendants but also from the plaintiff. Notice of variation and accuracy of the amount stated in the letter of demand are evidence tending to show whether the Form 16D is valid. These are not issues by themselves. They are facts relevant to the fact in issue. These are facts within the knowledge and power of the plaintiff. As enumerated in the *Low Lee Lian*'s case, a judge is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 ('the RHC') have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary and therefore, the burden is on the plaintiffs to show that they have satisfied the first two

requirements before the defendants are called upon to satisfy the third requirement. The first defendant affirmed his affidavit on 15 August 1996 (encl 11) for himself as first defendant and also for the second defendant. Paragraph 2 of the said affidavit stated: 'Saya adalah defendan pertama dan fakta-fakta yang dideposkan adalah dalam pengetahuan saya dan berkuasa membuat afidavit ini'. Paragraph 2 of the same affidavit made reference to the second defendant which stated: 'Merujuk perenggan 4 plaintif setakat liabiliti saya dan defendan kedua ditetapkan seperti yang dinyatakan dalam gadaian annexure tersebut.' It may be observed that the substance of the said affidavit clearly showed that the first defendant was affirming the affidavit for himself as well for the second defendant, otherwise why the first defendant needed to say he was authorized if he was speaking for himself. He must be speaking on behalf of the second defendant who was the only other defendant in the action. Other affidavits affirmed by the first defendant in this action, ie afidavit pembetulan affirmed on 15 August 1996 (para 1), afidavit tambahan affirmed on 15 August 1996 (para 1) expressly stated: 'Saya adalah defendan pertama dan fakta-fakta yang dideposkan ada dalam pengetahuan saya dan diberi kuasa mendeposkan afidavit ini juga untuk pihak defendan kedua.' It can be seen that by looking at all the affidavits as a whole in this action, what the first defendant said in his affidavit was for himself as well as for the second defendant who was the only other defendant in this action.

Paragraph 5 of the first defendant's affidavit affirmed on 15 August 1996 (encl 11), stated that the amount said to be owing referred to in para 7 to 10 as stated in the letter of demand and calculated in para 12 was not in accordance with the charge annexure. Therefore, under para 6 of the second defendant's said affidavit, the notice was invalid. Paragraph 12 of the supporting affidavit of Wan Anuar bin Abu Kassim affirmed on 31 December 1994 (encl 2) attempted to set out the requirements of O 83 r 3(3) RHC. This had been disputed. The issue was set out in the first defendant's affidavit. There was no prejudice to the plaintiff since it was the mandatory requirement of O 83 r 3(3) for the plaintiff to set out the details regarding the amount of the advance, amount of repayment, amount of interest or instalments in arrears at the issue of the originating summons and at the date of the affidavit and the amount remaining due under the charge. The evidence of the amount advanced, amount of interest or instalment in arrears and amount remaining due under the charge were all within the knowledge and power of the plaintiff. The requirement of the notice of variation of interest and service of such notice were in the charge annexure itself which was the plaintiff's document. The plaintiff should be well aware of this requirement and other requirements and put everything in order even before they commenced the action. Therefore, the question of the plaintiff being deprived of the right to show the notice of variation of interest did not arise. The fact stated in the Form 16D is within the knowledge and power of the plaintiff to prove. It is for the plaintiff to prove that Form 16D was in order before the defendants said that it was not in order. The contents of Form 16D were self-explanatory and self-evident. What the defendants submitted was that the contents of Form 16D were

not correct pursuant to the terms of the charge annexure and therefore invalid. The contents of Form 16D were evidence adduced by the plaintiff themselves. Variation of interest was a fact within the knowledge and power of the plaintiff tending to show the fact in issue, ie whether Form 16D was valid and why it was not valid. In fact the Federal Court in *Low Lee Lian*'s case at p 88 para D stated:

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

It is observed that the evidence required for the court to adjudicate can be gleaned not only from the affidavit evidence of the plaintiff but also from that of the defendants. There was nothing for the plaintiff to anticipate because the defendants were saying that the plaintiff's Form 16D was not pursuant to the charge annexure and therefore invalid.

In order to show why the Form 16D was invalid, the defendants merely showed how the validity of Form 16D was affected, inter alia, by variation of interest. The plaintiff had the obligation means and power under the charge annexure to give and serve the requisite notice. This was a fact known to the plaintiff. This was nothing new to the plaintiff. This was also not a new issue. The issue was whether Form 16D was valid. It was submitted that the evidence to show whether Form 16D was valid or not could be seen from the statement of the sum allegedly owed and interest stated in the letter of demand, the contents of Form 16D and whether there was notice of variation of interest. It was submitted that these were evidence tending to prove or disprove the fact in issue. Therefore, I am of the view that the question of notice of variation of interest was not an issue in itself, but it was evidence to support the defendant's contention. The case of *Co-operative Central Bank* show the effect of the chargee putting in a claim of default interest which the chargee was not entitled to claim which in turn affected the validity of Form 16D. Although the plaintiff chargee have the discretion to vary interest, but it was expressly stated in cl 3 of the charge annexure that '... Such amended rate of interest shall be payable as from the date specified in the said notice. Service of such notice shall be effected in the same manner as a notice of demand payment of the balance due as hereinbefore provided'. The obligation of the chargor/debtor to pay such amended interest will only be payable from the date specified in the notice and depended on whether such notice was in fact served. These were what the plaintiff promised under the terms of the charge. Whether the plaintiff was entitled to claim the alleged increased interest will depend on whether the plaintiff had given and served the requisite notice.

The two charges clearly stated that the principal sum secured were RM80,000 and RM50,000 respectively. Interest rates were also clearly

stated as 9% per annum with monthly rest and 7.5% per annum with monthly rests respectively. Clause 2 of the charge annexure clearly stated: 'Any demand for payment of the moneys intended to be hereby secured may be made by a notice in writing ...'. It is observed that the demand for payment was for moneys intended to be hereby secured. Clearly the moneys intended to be hereby secured were the principal sums of RM80,000 and RM50,000 respectively. The total principal sum secured was therefore RM130,000. It cannot be the principal sum of RM350,000 as alleged in para 12(i) of supporting affidavit of Wan Anuar (encl 2). There was a great difference between RM130,000 and RM350,000. If interest was calculated on such large sum, the result was astronomical, thus the plaintiff was getting a figure of RM324,648.36 for alleged interest alone accrued on the larger principal. The total sum inclusive of interest was said to be RM546,644.55 as alleged in para 12(v) of the plaintiff's supporting affidavit (encl 2). From the plaintiff's own affidavit evidence, the whole sum demanded was wrong because that was not the sum intended to be secured under the two charges. The plaintiff in their subsequent affidavit affirmed by Mohd Zambri bin Zainal Abidin on 26 December 1995 (encl 8) split into two:

(1) The principal sums allegedly owed by the borrower (Saad Sdn Bhd) as RM350,000 with interest and other expenses totalling RM634,884.33;

(2) the principal sums due under the two charges as RM80,000 and RM50,000 with alleged interest and expenses totalling RM147,610.58.

This is an admission on the part of the plaintiff that the sum demanded in the letter of demand and Form 16D was not the sum secured under the two charges. Subsequent affidavits filed by the plaintiff did the same, ie: (1) the sum allegedly owed by the customer; and (2) the sums secured under the two charges.

The letter of demand (exh A-4) demanded a sum of RM540,593.63 with interest at 2.5% per annum on daily rests which was said to be 'Pursuant to the terms of the above captioned charges, ...'. But this was not the sum secured under the charges. Form 16D referred to the said letter of demand which demanded a sum which was not secured by the two charges. By the plaintiff own evidence, it was clearly shown that the sum demanded was not the sum secured under the two charges. Further, cl 2 of the charge annexures clearly referred to '... Demand for payment of the moneys intended to be hereby secured'. Therefore, the letter of demand and Form 16D read together must be meant to be a demand under this clause. The plaintiff's counsel submitted that the inaccuracy in demand will not invalidate the demand and the plaintiff was entitled to demand the amount stated in the demand because the demand was not in accordance with the terms of the two charges. It was not merely a question of inaccuracy in the demand but it was a question of whether a demand by the plaintiff was pursuant to the terms of the charges. Failure to comply with the terms of the charge annexure went to the root affecting the validity of the demand.

Mediservices Pty Ltd is a case to show what was the effect of not specifying the particular default. This by analogy was similar to our s 254(1)(a) of the Code which requires 'specifying the breach in question.' If the plaintiff can demand all and sundry, then what was the meaning of 'specifying' in our Code and what was the meaning of the words 'up to sum of dollars ... only for principal ...' and 'moneys intended to be hereby secured' as stipulated under the charge annexure. The effect of excessive demand, ie asking for something which the plaintiff was not entitled to was shown in the case of *Co-operative Central Bank*. In *Bunbury Foods Pty Ltd v National Bank of Alasia Ltd* (1984) 153 CLR 491, a case authority submitted by the plaintiff, a debenture was granted to the bank to secure 'all moneys which are now or may from time to time hereafter owing or remaining unpaid to the bank'. This was an open charge, ie no limit was set. But in the instant case the sums secured under the two charges were limited expressly by the words 'up to' RM80,000/RM50,000 only 'for principal'. Hence, there is clearly a distinction between an unlimited security and a limited security and between what the plaintiff were entitled to and what the plaintiff were not entitled to claim under the security according to the terms of the charge and therefore, *Bunbury Foods* could be distinguished as such.

The case of *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] 1 MLJ 115 is dealing with a claim for a total amount due from two charges in the same land, whereas in the instant case the plaintiffs claimed an amount (RM350,000 with interest) not due and secured from the two charges. As can be seen later, there were two other securities which went to make up the total principal sum of RM350,000. The plaintiff have brought other actions in various courts to recover the same amount under other charges, ie High Court Shah Alam OS No 24–379–95 and High Court Kedah OS No 24–946–95. The court was made to understand that the defendants are appealing in the Shah Alam action and an order for stay was granted in Civil Appeal No B02–242–96 (copies of the relevant Notis Usul dated 6 December 1996 and Perintah dated 3 January 1997 are sighted). In *Syarikat Kewangan Melayu Raya Bhd*, the total amount due from both charges was not disputed, but in the instant case the total amount due under the two charges were disputed. From the first defendant's affidavit (encl 11) para 8 and 9 and exhs SA-2 and SA-3, it clearly showed that there were two other actions involving other securities and other parties for the same alleged principal sum of RM350,000. This had prejudiced the defendants because they were asked to pay the principal sum with interest which was not due or secured under the two charges. In other words, the plaintiff were claiming three times of the RM350,000 with interest. Although cl 6 of the charge annexures stated that 'The security created by this charge is expressly intended to be and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the customer(s) ...' but cl 1 of the first charge annexure stated that: 'The chargor(s) will on demand pay to the bank all sums of money which are or shall from time to time or at any time hereafter be due or owing by the abovenamed Saad Sdn Bhd ('the customer(s)') ... . Howsoever, up to the sum of Dollars Eighty Thousand (RM80,000) only for principal and for

interest at the rate of seven point five per cent (7.5%) per annum with monthly rests ...'. And cl 1 of the second annexure stated the same except the principal sum was RM50,000 and interest is 7.5% per annum with monthly rests. A

The limit of the securities were expressly stated in cl 1 of the charges. The interest was expressly stated as monthly rests. The charges were related to the land. The plaintiff were applying for an order for sale of the land. It is noted that the case of *Low Lee Lian* considered an order for sale as a proceeding in rem. B

Clause 7 stated: 'The bank may at its discretion from time to time at the request of the chargor advance to the customer such further sum or sums of money beyond the limit ...', but from the plaintiff's own affidavit, there did not appear to be any evidence of any request by the chargor to the bank to advance any further sum or sums of money or any up-stamping. In the absence of evidence of further advance beyond the limit at the request of the chargors and up-stamping of the charge, this clause was irrelevant and inapplicable. Clause 27 of the charge annexure was dealing with the restriction on consolidation under s 245 of the NLC and it did not state expressly that the limits of the securities stipulated in cl 1 of the charge annexures were not the limits of the defendants' liability under those charges. Clause 1 was clearly expressed and should mean what it said in plain language, ie all sums but up to the limit of the principal sum. All the other clauses such as cll 6, 7 and 27 do not appear to offer any aid in the construction of cl 1. C D E

It was submitted that the statement of the plaintiff's affidavit in para 7 of encl 2 was not challenged. Paragraph 5 of the first defendant's affidavit affirmed on 15 August 1996 (encl 11) stated the sum referred in para 7 to 10 was not in accordance to the charge annexures, which means it was not due under the charge. In order to be due under the charge, it must be also secured under the charge. The plaintiff may have lent a principal sum of RM350,000 to the borrower, but the question here was whether this sum was secured under the charge which was the subject matter of this proceeding. Clause 6 of the charge annexure was dealing with continuing security, but it did not say the limit of the security. However, cl 1 stipulated the limit of the principal sum of each security. If the security had no limit it is incomprehensible how the charge instrument could be stamped under the Stamp Duties Act and what amount should be the stamp duty. There was no evidence to show that the charges were stamped for the principal sum of RM350,000 allegedly advanced to the borrower. In the absence of evidence to show the charge instrument was stamped for RM350,000 as principal sum, the best evidence to show the principal sum was the amount stated in the charge instrument itself, besides the plaintiff's own admission in all subsequent affidavits filed in this action that the principal sums due under the charge were RM80,000 and RM50,000 respectively. The case of *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 cited by the plaintiff is a case dealing with the issue whether there was a continuing security and not on the question of the limit of the security. The case was not relevant to the issue in question here and was not applicable. F G H I

With regard to the case of *Malaysian International Merchant Bankers Bhd v Chi Liung Holdings Sdn Bhd* [1992] 1 MLJ 735 cited by the plaintiff, the case can be distinguished with the instant case here in that in the *Chi Liung* case, there appears to be one principal sum of RM2m which was the total limit of the principal amount secured under the charge given by *Chi Liung* to the bank. The Form 16D in the *Chi Liung* case reads as follows:

> Whereas you have c d a breach of the provisions of this charge by:
>
> failing or neglecting to pay inspite of a letter of demand dated 11 May 1989 and given by the chargee through their solicitors the outstanding balance due and owing under the said charge ...'

Whereas in the instant case, Form 16D (exh A5, p 43 of encl 2) reads:

> Whereas you have committed a breach of the provisions of this charge by failing to pay in full the sum stated in Messrs Skrine & Co's letter dated 13 September 1994 ...

There was no mention whether the sum stated in Skrine & Co's letter dated 13 September 1994 was the sum due and owing under the charge. But when reading the letter dated 13 September 1994 at exh A4 (pp 38–39 of encl 2) the letter stated:

> We are instructed that the said M/s Saad Sdn Bhd are indebted to in the sum of RM540,593.63 as at 31 July 1994 together with further interest accruing at rate of 2.5% per annum above our clients' base lending rate (presently 7.05% per annum) charged on a daily rests basis from 1 August 1994 to the date of full realization.
>
> Pursuant to the terms of the above captioned charge, we are instructed to demand from you, which we hereby do, for payment of the abovesaid sum to be made to our clients or to us as their solicitors within seven (7) days of the date hereof.

Chi Liung case is dealing with a first party charge (ie registered proprietor is the chargor and borrower) where all the securities were brought under one action for a total sum advanced, whereas in the instant case it was a third party charge (ie the registered proprietors were not the borrower) where two securities under one property were brought under one action for part of the principal sum advanced. The demand referred in From 16D was a demand for payment for the amount allegedly owed by the borrower (Saad Sdn Bhd). Interest was changed to (2.5% + 7.05% = 9.55%) daily rests. The demand was not for payment outstanding secured under the charge pursuant to the terms of the charge in question. The facts are different in each case and *Chi Liung* is not applicable. Similarly, the case of *Nira Sdn Bhd v Malayan Banking Bhd* [1990] 1 MLJ 110 also deals with a case where the bank applied for an order for sale of the lands charged to them to satisfy the whole of the sum secured by the said charge. The question of whether a demand for payment of moneys not secured under the charge can be a valid demand was not considered by the court in *Nira Sdn Bhd.*

In summary, the important question in this action is that whether the statutory notice in Form 16D read together with the letter of demand by the plaintiff's solicitors constituted a valid demand pursuant to the terms of the

charges in question. The burden is on the plaintiffs to show that Form 16D was issued in accordance with the charge and the plaintiff have failed to do so. Thus, the plaintiff's application by way of an originating summons is hereby dismissed. It is hereby ordered that each party bears its own costs.

Application dismissed.

Reported by Jafisah Jaafar